UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JAMES E. STEEN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 4:17-cv-737-NCC
	)	
ANNE L. PRECYTHE, et al.,	)	
	)	
Defendants.	)	

DEFENDANTS ANNE L. PRECYTHE, GEORGE LOMBARDI, AND TOM VILLMER'S MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS

Defendants Anne L. Precythe, George Lombardi, and Tom Villmer, by and through counsel, submit this Memorandum in Support of their Motion to Dismiss Plaintiff's Complaint [Doc. 1], pursuant to Federal Rule of Civil Procedure 12(b)(6).

I. Introduction

Plaintiff is an inmate incarcerated at Eastern Reception Diagnostic and Correctional Center ("ERDCC"). He has brought this lawsuit pursuant to 42 U.S.C. Section 1983 regarding events that occurred previously, while he was incarcerated at Farmington Correctional Center ("FCC"). [Doc. 1, ¶¶ 6, 8–9]. Plaintiff, by way of this lawsuit, seeks to blame Defendants in their individual capacities for injuries he alleges were sustained during his placement in Administrative Segregation at FCC. [Doc. 1, ¶ 17].

As demonstrated below, Plaintiff's lawsuit should be dismissed as a matter of law.

II. Legal Standard

Federal Rule of Civil Procedure 12(b)(6) permits a defendant to move for dismissal based upon a plaintiff's failure to state a claim upon which relief can be granted. The purpose of this Rule is to test the legal sufficiency of a complaint so as to eliminate those actions "which are fatally flawed in their legal premises and designed to fail, thereby sparing litigants the burden of unnecessary pretrial and trial activity." *Young v. City of St. Charles*, 244 F.3d 623, 627 (8th Cir. 2001) (citing *Neitzke v. Williams*, 490 U.S. 319, 326–27 (1989)).

To survive a motion to dismiss, the Complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Complaint "must include sufficient factual information to provide the 'grounds' on which the claim rests, and to raise a right to relief above a speculative level." *Schaaf v. Residential Funding Corp.*, 517 F.3d 544, 549 (8th Cir. 2008) (citing *Twombly*, 550 U.S. at 555 & n.3). This obligation requires a plaintiff to plead "more than labels and conclusions [or] a formulaic recitation of the elements of a cause of action. . ." *Twombly*, 550 U.S. at 555.

III. Argument

A. Plaintiff's lawsuit does not state a viable claim because he has failed to exhaust available administrative remedies.

Section 1997e(a) of the Prison Litigation Reform Act (PLRA) requires inmates to exhaust all available intra-prison administrative remedies prior to bringing lawsuits under Section 1983. 42 U.S.C. § 1997e(a). In the Missouri DOC, this requires a prisoner to do three things: "file an Informal Resolution Request (IRR), [file] an Inmate Grievance, and [file] an Inmate Grievance Appeal." *Hahn v. Armstrong*, 2010 WL 575748, *3 (E.D.Mo. Feb. 11, 2010). Exhaustion of these administrative remedies must occur *prior to* the filing of a lawsuit. *Johnson v. Jones*, 340 F.3d 624, 628 (8th Cir. 2003). This requirement applies to all prisoners seeking redress for prison "circumstances or occurrences," even when the prisoner seeks relief not available in grievance proceedings, such as money damages. *Krupp v. City of St. Louis Justice Center*, 2007 WL 3340809, *2 (E.D.Mo. Nov. 6, 2007) (citing *Porter v. Nussle,* 534 U.S. 516, 524 (2002) and *Foulk v. Charrier,* 262 F.3d 687, 697 (8th Cir. 2001)); *Hahn*, 2010 WL 575748 at *2 (citing *Porter*, 534 U.S. at 524).

A plaintiff's failure to exhaust administrative remedies requires immediate dismissal of the lawsuit. *Id.* (citing *Gibson v. Weber*, 431 F.3d 339, 341 (8th Cir. 2005); *Johnson*, 340 F.3d at 628 (exhaustion of administrative remedies is an "indispensable requirement, thus requiring an outright dismissal of such actions rather than issuing continuances so that exhaustion may occur"). If administrative remedies are available, they must be exhausted and courts "are not free to engraft upon the [PLRA] statute an exception that Congress did not place there." *Chelette v. Harris,* 229 F.3d 684, 688 (8th Cir. 2000) (quoting *Castano v. Nebraska Dep't of Corrections,* 201 F.3d 1023, 1025 (8th Cir. 2000)).

Here, Plaintiff admits that he has not exhausted the available administrative remedies prior to filing this lawsuit [Doc. 1, ¶ 10], but he provides a variety of excuses, which he believes should exempt him from this requirement. None of his arguments are availing.

For instance, Plaintiff alleges that "[d]ue to the injuries sustained by Plaintiff, as set forth [in the Complaint], coupled with his transfer to another prison by the Missouri Department of Corrections, Plaintiff was prevented from seeking administrative remedies. [Doc. 1, ¶ 10]. This allegation is both vague and without merit. First, the suggestion that his injuries somehow prevented him from pursuing administrative remedies does not make sense. Assuming he suffered the various injuries he alleged, he has failed to explain how any of those injuries could possibly have prevented him from following the necessary administrative procedures for relief.

Second, his assertion that he was prevented from pursuing administrative remedies due to his transfer to another prison is entirely baseless. As this Court has previously noted on multiple occasions, the Missouri DOC grievance procedure specifically addresses this very circumstance—where an inmate has been transferred from one institution to another—and the procedure expressly allows the inmate to pursue administrative remedies related to the institution from which he was transferred. *Brannon v. White*, 2011 WL 2564763, *2 (E.D.Mo. June 28, 2011); *Hahn*, 2010 WL 575748 at *3; *see also Stewart v. Crawford*, 2010 WL 3398742, *2 (W.D.Mo. Aug. 24, 2010) (finding that there are procedures for administrative relief that specifically address what an inmate should do when he has been transferred to a different corrections facility).

Plaintiff further asserts that he "was not required to seek administrative grievance or exhaust administrative remedies for his allegations of sexual abuse, pursuant to the Missouri Department of Corrections Department Procedure Manual regarding offender sexual abuse and harassment." [Doc. 1, ¶ 11]. This is categorically false. It is telling that Plaintiff has not cited a single policy or procedure that he believes exempts him from seeking administrative relief simply because his allegations involve sexual abuse. This is because there is no such exemption. Indeed, this Court has previously recognized that an inmate alleging sexual abuse must exhaust administrative remedies prior to filing suit. *See Georgeoff v. Barnes*, 2011 WL 3703230, *2, 5 (E.D.Mo. Aug. 23, 2011). Other courts within the Eighth

Circuit have similarly found that exhaustion of administrative remedies is required in such cases. S*ee, e.g.*, *Murphy v. Ledbetter*, 2014 WL 4406585, *1 (W.D.Ark. Sept. 8, 2014) (dismissing an inmate's claims related to an alleged sexual assault because the inmate failed to exhaust administrative remedies as required by the PLRA), *aff'd by Murphy v. Ledbetter*, 608 Fed.Appx. 440 (8th Cir. 2015))); *Payton v. Thompson*, 2015 WL 252277, *3–4 (E.D.Ark. Jan. 20, 2015) (inmate alleging sexual abuse was required by the PLRA to exhaust administrative remedies prior to filing suit); *Harris v. Williams*, 2014 WL 860560, *1, 3–4 (E.D.Ark. Mar. 5, 2014) (same); *Conway v. Norris*, 2011 WL 4944681, *1–3 (E.D.Ark. Sept. 29, 2011) (same).

Finally, Plaintiff alleges that "Defendants intentionally and unjustifiably interfered with the Plaintiff's right to exercise his administrative remedies." [Doc. 1, ¶ 40]. This sweeping assertion is wholly conclusory and fails to offer any specific facts in support. Plaintiff fails to provide even the faintest level of detail as to what Defendants supposedly did to "interfere" with his access to the administrative process. One might glean from the Complaint that Plaintiff is referring to the defendants' role, assuming they had one, in transferring him to another institution; however, as stated above, an inmate's transfer *does not* exempt him from exhausting administrative remedies prior to filing suit.

Plaintiff's allegations, on their face, demonstrate that he has failed to exhaust all available intra-prison administrative remedies as required by Section 1997e(a) of the Prison Litigation Reform Act. Therefore, his lawsuit should be dismissed as a matter of law.

B. Plaintiff's lawsuit should be dismissed for the additional reasons that: (1) his allegations are impermissibly broad and conclusory, and fail to show each defendant's personal involvement; (2) the doctrine of *respondeat superior* is not applicable in Section 1983 cases; (3) Plaintiff has failed to allege all elements of a cognizable cause of action; and (4) Defendants are entitled to qualified immunity.

1. Plaintiff's allegations are impermissibly broad and conclusory, and fail to show each defendant's personal involvement.

The Eighth Circuit has long held that "[b]road and conclusory statements unsupported by factual allegations are not sufficient to support a cause of action under § 1983." *Ellingburg v. King*, 490 F.2d 1270, 1271 (8th Cir. 1974) (internal citations omitted).

Indeed, relying on *Ellingburg*, this Court has repeatedly dismissed lawsuits for the reason that the complaints, like Plaintiff's Complaint in this case, failed to allege the necessary facts that had to be proven before obtaining a judgment against the named defendants. *See e.g., Winters v. Palumbo*, 512 F.Supp. 7, 9 (E.D.Mo. 1980); *Alton v. Faerber*, 2009 WL 2235913, *2 (E.D.Mo. 2009); *Croskey v. County of St. Louis*, 2014 WL 3956617, *1 (E.D.Mo. 2014).

The United States Supreme Court agrees that "mere conclusory statements" are not sufficient. *Iqbal*, 556 U.S. at 678. And, the plaintiff is required to plead "more than labels and conclusions." *Twombly*, 550 U.S. 544, 555 (2007)

Moreover, it is well-settled that "[l]iability under § 1983 requires a causal link to, and direct responsibility for, the deprivation of rights." *Madewell v. Roberts,* 909 F.2d 1203, 1208 (8th Cir. 1990) (citing *Rizzo v. Goode,* 423 U.S. 362, 370–71, 375–77 (1976), and *Cotton v. Hutto,* 577 F.2d 453, 455 (8th Cir. 1978) (per curiam)). Therefore, in order to state a claim under Section 1983, a plaintiff must show that a defendant "*personally* violated the plaintiff's constitutional rights." *Jackson v. Nixon*, 747 F.3d 537, 543 (8th Cir. 2014) (emphasis added) (citing *Iqbal*, 556 U.S. at 676).

Here, Plaintiff lumps Defendants Precythe, Lombardi, Villmer, and John/Jane Doe 1 through 50 together, and alleges generally that "Defendants" engaged in various unlawful acts or omissions. [Doc. 1, ¶¶ 15, 25–29, 33–41]. Plaintiff makes no effort to offer allegations specific to any particular defendant individually. It is impossible for Precythe, Lombardi, and Villmer to defend this lawsuit without knowing specifically what it is that Plaintiff is accusing them of doing. Such generalized allegations are impermissibly broad and conclusory under *Ellingburg*, *Iqbal*, and their progeny; and the allegations fail to show each defendant's personal involvement as required by *Madewell*, *Cotton*, and *Jackson*.

For these reasons, Plaintiff has failed to state a cause of action and his lawsuit should be dismissed.

2. Defendants cannot be held liable based merely on their administrative positions within the Missouri DOC.

Although it is not clear from the Complaint what specifically Plaintiff is accusing Precythe, Lombardi, and Villmer of doing, it appears he may have named them in this lawsuit based on their positions as the Director and former Director of the Missouri DOC and Warden of FCC, respectively.

To the extent Plaintiff believes Defendants Precythe, Lombardi, and Villmer should be held liable based on a *respondeat superior* theory, merely because of their administrative positions within the Missouri DOC, that argument is without merit. Indeed, the doctrine of *respondeat superior* is not applicable in Section 1983 cases. *Jackson*, 747 F.3d at 543 (citing *Iqbal*, 556 U.S. at 676). Moreover, "**a general responsibility for supervising the operations of a prison is insufficient to establish the personal involvement required to support liability**." *Keeper v. King*, 130 F.3d 1309, 1314 (8th Cir. 1997) (emphasis added) (citing *Camberos v. Branstad*, 73 F.3d 174, 176 (8th Cir. 1995)); *Ouzts v. Cummins,* 825 F.2d 1276, 1277 (8th Cir.1987).

For this reason as well, Plaintiff's lawsuit should be dismissed.

3. Plaintiff's allegations fail to state a cognizable cause of action.

The Eighth Amendment provides inmates with protection from cruel and unusual punishment. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994); U.S. CONST. amend. VIII. This protection places various restraints or duties on prison officials. *Farmer*, 511 U.S. at 832. One such duty is to "protect prisoners from violence at the hands of other prisoners." *Id.* at 833. Thus, if a prison official fails to protect a prisoner from such violence, he might be liable for causing the prisoner to be subjected to cruel and unusual punishment in violation of the Eighth Amendment.[1]

"It is not, however, every injury suffered by one prisoner at the hands of another that translates into constitutional liability for prison officials responsible for the victim's safety." *Id.* at 834. A prison official violates the Eighth Amendment only when two elements are met: The first element is satisfied where there has been a "sufficiently serious" deprivation of the inmate's right to be free from cruel and unusual punishment. *Id.* To be considered "sufficiently serious," the defendants' actions or omissions must result in the denial of "the minimal civilized measures of life's necessities."

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[1] It is puzzling that Plaintiff, here, pleads Count I for "Breach of Duty to Protect from Violence" and Count II, which is plead "in the Alternative," for "Eighth Amendment – Cruel and Unusual Punishment. [Doc. 1, pp. 2, 6]. As stated above, these claims are not separate and distinct. That is, "breach of duty to protect" is not, itself, a cause of action; but in some cases it can be part of an Eighth Amendment "cruel and unusual punishment" claim. *See Farmer*, 511 U.S. at 832–33.

Id. Further, for a claim based on failure to prevent harm, like the instant case, the Plaintiff must show also that the conditions of his confinement posed "a substantial risk of serious harm." *Id.*

The second element is satisfied where the prison official subjectively had a sufficiently culpable state of mind. *Id.* at 834, 837. That means the official was "deliberately indifferent" to the inmate's health or safety. *Id.* at 834. This requires a showing of more than mere negligence. *Id.* at 835. "It is, indeed, fair to say that acting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk." *Id.* at 836. The prison official has acted with deliberate indifference (or recklessness) if he "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.*

Here, Plaintiff jumbles the above elements and standards throughout his two-count Complaint and, in some instances, he alleges the wrong standard altogether. For example, he alleges that Defendants' failed to exercise "ordinary care", that their conduct was "negligent," and that their "negligence" caused Plaintiff's injuries [Doc. 1, ¶¶ 4, 25, 27–30]. However, negligence and "ordinary care" are not the requisite *mens rea* for a "cruel and unusual punishment" claim. *Farmer*, 511 U.S. at 835. Rather, Plaintiff must show that Defendants were "deliberately indifferent," which requires a showing more akin to "recklessness." *Id.* at 836.

In addition, Plaintiff alleges that Defendants "knew or should have known" that their conduct would create "a dangerous and unsafe condition for Plaintiff." [Doc. 1, ¶¶ 25, 35]. However, a "cruel and unusual punishment" claim requires a subjective showing that the defendant *actually* "knows of and disregards" an excessive risk to the inmate's health and safety—not merely that the defendant "knew or should have known" as suggested by Plaintiff. *See Farmer*, 511 U.S. at 837.

Indeed, the U.S. Supreme Court has rejected the argument that a prison official who was unaware of a substantial risk of harm to an inmate may nevertheless be held liable if the risk was obvious and a reasonable prison official would have noticed it. *Id.* at 841–42.

Here, any inference suggested by Plaintiff that Precythe, Lombardi, and Villmer—administrators within the Missouri DOC—somehow knew about an excessive risk to Plaintiff's safety is, at best, a far-fetched proposition. *See generally Keeper*, 130 F.3d at 1314 (allegations of a general supervisory authority over a prison are not sufficient to establish a defendant's personal involvement); *Camberos*, 73 F.3d at 176 (same); *Ouzts,* 825 F.2d at 1277 (same).

The tenuousness and implausibility of the suggestion that Precythe, Lombardi, and Villmer had actual knowledge of an excessive risk to Plaintiff is further evident by the total lack of allegations in the Complaint specific to Defendants Precythe, Lombardi, and Villmer. Therefore, Plaintiff's claims against these defendants clearly fall far short of being "plausible" and should be dismissed. *Iqbal*, 556 U.S. at 678 (to survive a motion to dismiss, the Complaint must contain sufficient factual matter to state a claim that is "plausible" on its face; not merely "possible.")

For all of these reasons, Plaintiff has failed to state a cognizable cause of action and his Complaint should be dismissed.

4. Defendants have qualified immunity.

Under the doctrine of qualified immunity, a government official is "shield[ed]. . . from liability when his conduct does not violate 'clearly established [federal] statutory or constitutional rights of which a reasonable person would have known.'" *Krout v. Goemmer*, 583 F.3d 557, 564 (8th Cir. 2009) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). To determine whether qualified immunity applies, courts examine two factors: 1) whether there has been a violation of a constitutional or statutory right, and 2) whether that constitutional right was clearly established such that a reasonable official would have known that his actions were unlawful. *Id.* (citing *Pearson v. Callahan* 555 U.S. 223, 232 (2009)).

As a matter of public policy, qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Qualified immunity "gives ample room for mistaken judgment." *Hunter v. Bryant*, 502 U.S. 224, 229 (1991). This accommodation exists so that officials are not forced to err always on the side of caution for fear of being sued. *Id.*

Here, for all the reasons stated in Sections III.B.1–3 above, it is impossible for Plaintiff to show a violation of a clearly established constitutional right. This is dispositive of Plaintiff's claims. *See Livers v. Schenck,* 700 F.3d 340, 360 (8th Cir. 2012) (defendants were entitled to qualified immunity where their conduct did not violate a clearly established law).

In addition, Plaintiff has not offered any allegations that would plausibly support a conclusion that Precythe, Lombardi, and Villmer, as administrators within the Missouri DOC, did something to "knowingly violate the law," as required by *Malley*.

For these reasons as well, Plaintiff's claims necessarily fail and should be dismissed.

IV. Conclusion

WHEREFORE, for all of the foregoing reasons, the claims against Defendants Anne L. Precythe, George Lombardi, and Tom Villmer should be dismissed as a matter of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March, 2017, the foregoing was filed electronically with the Clerk of Court to be served upon all parties by operation of the Court's ECF system.

/s/ Andrew D. Kinghorn
Assistant Attorney General